UT 01-3
Tax Type: Use Tax
Issue: Use Tax On Aircraft Purchase

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,	No. 00-ST-0000 IBT# 0000-0000
v.	NTL 00 000000000000000
ABC AVIATION, INC., **Taxpayer**	**Ted Sherrod**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Attorney General Shepard Smith on behalf of the Illinois Department of Revenue; Marc W. O'Brien, Esq. of Aronberg, Goldgehn, Davis & Garmisa, on behalf of ABC Aviation, Inc.

Synopsis:

The Department of Revenue (hereinafter the "Department") issued a Notice of Tax Liability ("NTL") to ABC Aviation, Inc. (hereinafter "ABC Aviation" or the "taxpayer") on November 2, 1999 for Use Tax, penalty and interest in the amount of $290,518. The NTL was based on the taxpayer's purchase of an aircraft for use in this state. A protest was filed on behalf of the taxpayer by its legal counsel, and a hearing on this matter was held on November 22, 2000. The parties also filed joint exhibits and memoranda of law in support of their respective positions. After reviewing the record herein, comprised of testimony during the hearing, the joint exhibits and the memoranda

of law submitted by the parties, it is my recommendation that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Audit Correction and/or Determination of Tax Due for the period of April 8, 1996 for use tax due on a purchase, plus penalties totaling $257,850. Dept. Ex. 1.

2. The taxpayer is a Delaware Corporation located at 123 ABC Lane, Anywhere, Illinois. Joint Ex. 2, 3.

3. The taxpayer is owned by John Doe. Tr. p. 14.

4. Southern Aircraft Services, Inc. (hereinafter "SAS" or "Southern Aircraft") is a Florida corporation located at 1170 Leo Wagener Boulevard, Fort Lauderdale, Florida. Joint Ex. 3.

5. SAS is engaged in the sale of aircraft as part of its primary business of leasing aircraft to affiliated companies and as part of its aircraft sales brokerage business. Tr. pp. 17, 23, 24.

6. Executive Aircraft Services, Inc. ("EAS") is a corporation located at 15115 N. Airport Drive, Scottsdale, Arizona. Joint Ex. 22.

7. Montgomery Ward & Co. Incorporated ("Montgomery Ward") is a corporation located at 619 W. Chicago Avenue, 8th Floor, Chicago, Illinois. Joint Ex. 3.

8. On July 20, 1995, the taxpayer and Montgomery Ward entered into a Purchase and Sale Agreement ("Agreement") wherein Montgomery Ward agreed to sell a

Gulfstream GII aircraft ("Gulfstream") to the taxpayer for the purchase price of $3,200,000. Tr. p. 13; Joint Ex. 3.

9. Paragraph 17 of the Agreement allowed the taxpayer to assign the Agreement to SAS. Joint Ex. 3.

10. In July, 1995 the taxpayer and SAS entered into an assignment of contract assigning the Agreement to SAS and agreed to enter into an Aircraft Lease Agreement with Option to Purchase ("Lease Agreement"), pursuant to which SAS leased the Gulfstream to the taxpayer for a term of twelve months commencing in 1995, and granted the taxpayer an irrevocable option to purchase the aircraft at any time during the term of the lease. Tr. p. 14; Joint Ex. 3.

11. Prior to September 18, 1995, Montgomery Ward was the owner of the Gulfstream; on September 18, 1995, Montgomery Ward executed an Aircraft Bill of Sale pursuant to which it agreed to "sell, grant, transfer and deliver all rights, title, and interests in and to" the Gulfstream to SAS. Joint Ex. 4.

12. On September 18, 1995, the taxpayer and SAS executed a chattel mortgage security agreement in favor of American National Bank and Trust Company of Chicago as secured party. Joint Ex. 5.

13. On March 14, 1996, the taxpayer filed an Aircraft Registration Application with the Federal Aviation Administration registering as the owner of the Gulfstream. Joint Ex. 8, 13.

14. On March 15, 1996, the taxpayer and SAS entered into a closing agreement covering the sale of the Gulfstream from SAS to the taxpayer. Joint Ex. 9.

15. On April 7, 1996, the taxpayer terminated its lease with SAS. Joint Ex. 12.

16. Prior to 1996, the taxpayer owned a 1976 IAI Westwind 1124 ("Westwind"). Joint Ex. 16.

17. The option to purchase the Gulfstream granted the taxpayer by the Lease Agreement also granted the taxpayer the right to trade in the Westwind owned by the taxpayer in partial satisfaction of the option purchase price. Joint Ex. 3.

18. The taxpayer exercised its option to purchase the Gulfstream from SAS and trade in the Westwind for the Gulfstream; consequently, the taxpayer received a credit against the purchase price of the Gulfstream in the amount of $1,317,000. Tr. p. 42.

19. On March 11, 1996, SAS registered as the owner of the Westwind; on or prior to March 11, 1996, the taxpayer executed an Aircraft Bill of Sale pursuant to which it agreed to "sell, grant, transfer and deliver all rights, title, and interests in and to" the Westwind to SAS. Joint Ex. 16, 17.

20. On February 23, 1995, SAS offered to sell the Westwind to EAS for the purchase price of $1,350,000; this offer was subsequently amended on March 13, 1996 to reduce the purchase price to $1,317,000. Joint Ex. 18, 19.

21. In March, 1996, SAS and EAS entered into a closing agreement covering the sale of the Westwind from SAS to EAS. Joint Ex. 21.

22. SAS executed an Aircraft Bill of Sale pursuant to which it agreed to "sell, grant, transfer and deliver all rights, title, and interests in and to" the Westwind to EAS. Joint Ex. 22.

Conclusions of Law:

The taxpayer is an Illinois corporation established by its owner to hold title to aircraft. Tr. pp. 12, 13. Prior to September, 1995, the taxpayer owned a Westwind aircraft. Taxpayer's Brief p. 2. The taxpayer decided to replace this aircraft with a Gulfstream aircraft owned by Montgomery Ward. Tr. pp. 13, 35; Joint Ex. 3. To effectuate this acquisition, the taxpayer entered into an agreement with Montgomery Ward to purchase the Gulfstream on July 20, 1995. Joint Ex. 3.

The taxpayer's owner wanted to structure the disposition of the Westwind in a manner that would enable the taxpayer to defer, for Federal income tax purposes, the anticipated gain that would be realized upon the disposition of the Westwind. Tr. p. 13, 14, 36, 37. Since this could not be accomplished by acquiring the Gulfstream from Montgomery Ward directly, the taxpayer devised a scheme to qualify for the federal tax benefits being sought. Tr. pp. 13, 14.

Southern Aircraft Services, Inc. is an aircraft leasing and brokerage firm with its principal place of business in Fort Lauderdale, Florida. Tr. pp. 21, 22, 23, 24; Joint Ex. 3. In 1995, SAS entered into a contract with the taxpayer pursuant to which SAS agreed to accept an assignment of the taxpayer's right to purchase the Gulfstream from Montgomery Ward, purchase this aircraft and sell it to the taxpayer in exchange for the Westwind. Tr. p. 14; Joint Ex. 3. This contract was drafted in a manner intended to permit the taxpayer to defer, pursuant to Section 1031 of the Internal Revenue Code ("IRC"), the recognition of gain realized by selling the Westwind. Tr. pp. 13, 14, 36.

Section 1031(a)(1) of the IRC provides an exception to the general rule requiring the recognition of taxable gain upon the sale or exchange of property. Under Section 1031 (a) (1), no gain or loss is recognized if property held for productive use in a trade or

business, or for investment is exchanged solely for property of like kind to be held for such purposes.

Pursuant to its contract with SAS, the taxpayer assigned its right to purchase the Gulfstream to SAS, acquired an option to purchase the Gulfstream from SAS after SAS acquired this aircraft from Montgomery Ward, and agreed to sell the Westwind to SAS in partial payment for the Gulfstream. Tr. pp. 13, 14, 15, 16; Joint Ex. 3. Since SAS had no intention of acquiring the Gulfstream for its own use, it was agreed by the parties that the taxpayer would lease the Gulfstream from SAS until it was purchased by the taxpayer (Tr. p. 40; Joint Ex. 3). It was also agreed that the taxpayer would not exercise its option to purchase the Gulfstream until a buyer to purchase the Westwind from SAS could be found (Tr. p. 14). Subsequently, Executive Aircraft Services, Inc. agreed to acquire the Westwind from SAS, and the taxpayer exercised its option to acquire the Gulfstream from SAS in exchange for the Westwind and $1,883,000. Tr. p. 42.

The taxpayer did not pay Illinois use tax on its acquisition of the Gulfstream. On October 7, 1999, the Illinois Department of Revenue issued a SC 10-K, Audit Correction and/or Determination of Tax Due ("correction of return") pursuant to which it assessed use tax on the aircraft. Dept. Ex. 1. The correction of return was prepared pursuant to Section 5 of the Retailers' Occupation Tax Act ("ROTA"), (35 **ILCS** 120/5). This section is incorporated into the Use Tax Act (35 **ILCS** 105/1 *et seq.*) through section 12 thereof (35 **ILCS** 105/12). Section 5 of the ROTA provides in pertinent part as follows:

> In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination.

(35 **ILCS** 120/5).

Because the correction of return is part of the record (Dept. Ex. 1), the Department has established its *prima facie* case. Masini v. Department of Revenue, 60 Ill. App. 3rd 11 (1st Dist. 1978). Consequently, the burden shifted to the taxpayer to prove that the Department's determination of tax liability was incorrect by way of competent evidence in the form of books and records. Masini v. Department of Revenue, *supra*; Copilevitz v. Department of Revenue, 41 Ill. 2nd 154 (1968); A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988); Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366 (1st Dist. 2000). Until such proof is provided by the taxpayer, the corrected return prepared by the Department of Revenue is presumed to be correct. Copilevitz v. Department of Revenue, *supra*.

The taxpayer argues that the Illinois use tax did not apply to its purchase of the Gulfstream because it bought the Gulfstream from Montgomery Ward, not SAS (Tr. p. 17), and Montgomery Ward was not an aircraft retailer (Tr. p. 13). It contends in its brief (at page 6) that the purchase was therefore an exempt "occasional sale" under Department regulations interpreting Section 2 of the Use Tax Act (35 **ILCS** 105/2). In support of this claim the taxpayer contends that SAS "never owned the plane", "never had title", "never had possession of the plane", and "never had any risk on the plane" (Tr. p. 17). The taxpayer argues that SAS was merely a "bear titleholder for purposes of allowing ABC Aviation to effect the trade-in of its Westwind for the Gulfstream and obtain the federal tax benefits that come from a like-kind exchange." Tr. pp. 17, 18. The taxpayer, in its brief (at page 4) points to evidence supporting its claim that it purchased

the aircraft from Montgomery Ward. It points out that SAS used none of its own money to purchase the Gulfstream and had no risk of liability in connection with this purchase.

The Department maintains that this transaction should be viewed very differently. It argues that Montgomery Ward transferred title to the Gulfstream to SAS, which subsequently transferred title to the taxpayer. Dept. Brief p. 4. Accordingly, the taxpayer purchased the aircraft from SAS, a registered Florida aircraft dealer (Tr. p. 26) rather than from Montgomery Ward.

The record clearly establishes that the taxpayer's acquisition of title to the Gulfstream was preceded by a transfer of title to the aircraft by Montgomery Ward to SAS. Joint Ex. 4. However, the record also supports the taxpayer's contention that the transaction was in substance a transfer of title to the aircraft from Montgomery Ward to the taxpayer, with SAS having agreed to receive title to the aircraft from Montgomery Ward as an accommodation to the taxpayer. Tr. pp. 35, 36, 37, 38, 39, 40, 41, 42. The question presented, therefore, is whether the form of the transaction or its substance should prevail in determining the use tax consequences of the taxpayer's acquisition.

There is abundant case law to the effect that the courts will look to the substance rather than the form of a transaction in determining tax liability. Frank Lyon Co. v. United States, 435 U.S. 561 (1978); Comdisco, Inc. v. United States, 756 F. 2nd 569 (1985); Young v. Hulman, 39 Ill. 2nd 219 (1968); Lincoln National Life Insurance Co. v. McCarthy, 10 Ill. 2nd 489 (1957). However, the Illinois courts have not endorsed the elevation of substance over form to create a sales tax exclusion where the legislature has not seen fit to exclude such sales from taxation. Superior Coal Co. v. Department of Finance, 377 Ill. 282 (1941); Valier v. Department of Revenue, 11 Ill. 2nd 402 (1957). In

Superior Coal Co., *supra*, the Illinois Supreme Court rejected a coal company's argument that it and its parent railroad corporation were in substance so integrated that transactions relating to the transfer of coal between these entities were not "sales" with the meaning of the ROTA. The court refused to grant the relief sought by the taxpayer, reasoning that the General Assembly had not seen fit to exclude sales between affiliated corporations, and that the court could not, by tortuous construction of the law, create such an exemption.

The reasoning of the court in Superior Coal, a case construing the ROTA, is applicable to the facts in this case because the definition of retail sale ("sale at retail") contained in the ROTA (at 35 **ILCS** 120/1), and the Use Tax Act (at 35 **ILCS** 105/2) are virtually identical. Section 2 of the Use Tax Act (35 **ILCS** 105/2) defines a "sale at retail" as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property…for a valuable consideration". As title to the Gulfstream was transferred from SAS to the taxpayer for $3.2 million, the Department determined that a sale at retail had occurred and assessed tax on this transaction. The statute clearly indicates that use tax is due when a retail sale occurs. 35 **ILCS** 105/3. Moreover, the legislature has created no exceptions to the application of tax where the transaction is in form a retail sale but in substance a device to qualify for federal income tax benefits under Section 1031 of the IRC. *Id*. To create an exemption for these types of transactions where the legislature has failed to do so would be contrary to the Supreme Court's reasoning in Superior Coal.

Moreover, to construe the Use Tax Act in the manner requested by the taxpayer, this tribunal would have to allow the taxpayer to disavow the form of the transaction giving rise to federal income tax benefits under Section 1031. These benefits are contingent upon a finding that the taxpayer has made a "like kind" exchange. IRC Section 1031(a). The 7th Circuit Court, in a case involving an appeal from an Illinois District Court, has held that a taxpayer has a right to assert the priority of substance over form; but only where the taxpayer's tax reporting and actions show an honest and consistent respect for the substance of the transaction. Comdisco v. United States, *supra*. In the instant case, there is no consistency in the taxpayer's characterization of the transaction in controversy. As noted above, the parties have structured the sale of the aircraft as a like kind exchange qualifying for tax benefits provided by IRC Section 1031. To do so, the taxpayer could not purchase the Gulfstream directly from Montgomery Ward because federal tax rules necessitate an intermediary sale transaction. For federal tax purposes, the taxpayer argues that this intermediary sale must be recognized, while for state tax purposes its argues that this intermediary sale should be disregarded. Consequently, for federal tax purposes it is purported that SAS is the seller, while for state tax purposes it is claimed that Montgomery Ward is the seller. Clearly, there is no consistency in the taxpayer's characterization of this transaction. Accordingly, the taxpayer cannot be allowed to avoid the use tax while at the same time prevailing at the federal level by characterizing the transaction differently.

The taxpayer has cited numerous authorities including Lincoln National Life Insurance Co. v. McCarthy, *supra*, and cases cited therein, and Estate of Wilson v. Wilson, 71 Ill. App. 3rd 882 (4th Dist. 1979), for applying a substance over form analysis.

However, none of these cases construe state sales or use tax laws. Moreover, as pointed out by the taxpayer in its brief at page 7, with the exception of Estate of Wilson, *supra* these cases have applied the principle of substance over form to "reach the taxable substance of a transaction where the form of the transaction would not be taxable". These cases do not address the taxpayer's contention favoring application of this principle to render a transaction non-taxable.

In Estate of Wilson, *supra*, the court addressed the issue whether the passage of complete ownership of jointly titled stock and bank account assets, passing to a surviving spouse as joint tenant, is subject to the state's inheritance tax. The Appellate Court held that the inheritance tax was not applicable because the transfer of assets to joint ownership did not give the decedent a type of ownership interest that could be inherited or taxed. This decision was reversed by the Supreme Court in In re Wilson's Estate, 81 Ill. 2nd 349 (1980).

In Estate of Wilson v. Wilson, *supra*, the court's decision was fully supported by the facts contained in the record before the court. Application of a substance over form analysis did not require the court to disregard facts that were proven or manufacture facts that were not. Here, the record plainly shows a transfer of title from Montgomery Ward to SAS prior to any transfer of title from SAS to the taxpayer. The taxpayer contends that, through application of the substance over form principle, this tribunal can disregard this transfer which the record shows took place, and manufacture a transfer of title from Montgomery Ward to the taxpayer that did not. Estate of Wilson, *supra* does not support the application of the substance over form principle in this manner.

The taxpayer has cited no authority for applying a substance over form analysis to determine the applicability of the Illinois Use Tax Act at issue here, and has not demonstrated why the reasoning underlying this type of analysis is applicable to the state's sales and use taxes. It was incumbent upon the taxpayer to do so because, even where the taxpayer produces sufficient evidence to overcome the Department's *prima facie* case, a taxpayer claiming to be exempt from tax has the burden of proving that it is entitled to such an exemption. Telco Leasing, Inc. v. Allphin, 63 Ill. 2nd 305, 310 (1976). For this reason, and for the reasons noted above, I cannot conclude that the sale between SAS and the taxpayer should be disregarded, or that the transaction in controversy should be treated as a purchase of the Gulfstream from Montgomery Ward. Moreover, the taxpayer has presented no documentary evidence showing that Montgomery Ward was not engaged in making retail sales of aircraft and was not an aircraft dealer. The record contains only the unsubstantiated assertions of the taxpayer that Montgomery Ward did not conduct business as an aircraft retailer. Tr. p. 13. Unsubstantiated testimony is not sufficient evidence to rebut the Department's *prima facie* case. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3rd 203, 217 (1st Dist. 1991). Consequently, even if the record supported a holding that the transaction at issue should be treated as a sale of the Gulfsteam by Montgomery Ward to the taxpayer, the taxpayer would not overcome the Department's *prima facie* case.

The taxpayer also contends that the transaction at issue was an exempt "occasional sale" because SAS was not a retailer. Tr. pp. 16, 17. In support of this argument the taxpayer, at pages 5 and 6 of its brief, makes the following arguments.

> In the instant case, SAS is not a retailer as a matter of law. The undisputed facts establish that SAS primarily is engaged in the business

> of owning, managing and maintaining aircraft which it leases to affiliated companies. Indeed, none of the indicia which normally indicate a retailer exist in this case. SAS does not maintain an inventory of aircraft for sale. SAS does not advertise aircraft for sale at retail. SAS does not employ any sales people. Moreover SAS only sells aircraft it owns to upgrade planes used in its own business.

As noted above, the Use Tax Act defines a "sale at retail" as follows: "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing." 35 **ILCS** 105/2. The Illinois Supreme Court has construed this language to mean that a taxpayer acquiring property for use or consumption from a seller that is engaged in the business of selling the product being purchased is making a retail purchase from a retailer for purposes of the Use Tax Act. Mobil Oil v. Johnson, 93 Ill. 2nd 126, 134, 135 (1982) ("(I)f one purchases a product for use or consumption from a seller who is in the business of selling that product, one has purchased the product at retail from a retailer for purposes of the Retailers' Occupation Tax Act and the Use Tax Act"). Moreover, in Mobil Oil v. Johnson, *supra*, the court rejected the taxpayer's contention that no retail sale took place because its supplier was not a retailer. *Id* at 134. This conclusion was based on its finding that the purchase of tangible personal property for use by the taxpayer constituted a purchase at retail under 35 **ILCS** 102/2. The court also rejected the taxpayer's contention that a determination whether a seller is a retailer must be based on the nature of the seller's business rather than the use to which the object of the sale is put. *Id* at 134

("The application of the Act to the sale depends upon whether the purchased property was used or consumed by the buyer or whether it was resold by the buyer…(I)t matters not that the seller holds himself out as a wholesaler…nor that he is engaged in a business not typically associated with retail sales").

The record in this case shows that the Gulfstream was purchased by the taxpayer for use by the taxpayer rather than resale, (Tr. pp. 44, 45), and that SAS was engaged in selling aircraft as part of its primary business as an aircraft lessor (Tr. pp. 23, 24). See also Joint Ex. 24 which includes Southern Aircraft's 1996 Federal income tax return wherein SAS defines its business as "Leasing/Sales", and its 1995 Federal income tax return which identifies its business as "Aircraft Sales". Moreover, SAS made sales of aircraft as part of its aircraft sales brokerage business and as an accommodation to its customers (Tr. pp. 17, 24). Consequently, based on the precedent noted above, it can be concluded from these facts that the Gulfstream was purchased from a retailer because the purchase of this aircraft for use or consumption from a company engaged in selling aircraft constituted a taxable retail purchase. *Id*.

Even if the Illinois use tax were construed to base a determination whether a sale by a retailer has occurred on the nature of the seller's business, the record does not support a finding in favor of the taxpayer. The Department argues that SAS was a registered dealer in Florida, and that this conclusively establishes that it was an aircraft retailer to which the occasional sale exemption did not apply. Dept. Brief p. 8. The taxpayer contends that its status as a dealer is not determinative because it registered as a Florida dealer only because it was engaged in lease transactions which are defined as retail sales in Florida, but not under Illinois law. Tr. pp. 16, 17. The taxpayer, in its brief

(at page 5) also argues that SAS was not an aircraft retailer because it was primarily engaged in the business of owning, leasing and maintaining aircraft held for lease to affiliated companies, and did not maintain an inventory of aircraft for sale.

In support of its contentions, the taxpayer introduced the testimony of Smith, the Vice President, Treasurer and Assistant Secretary of SAS (Tr. p. 21), letters from the Florida Department of Revenue (Joint Ex. 23, 24) and state and federal income tax returns for SAS (Joint Ex. 24). The SAS income tax returns indicate that SAS depreciated the aircraft it owned, and thus support the taxpayer's claims that SAS did not maintain an inventory of aircraft for sale. IRC Reg. § 1.167(a)-2. However, the taxpayer did not introduce the Florida dealer's license of SAS that might have conclusively established for what purpose the license was obtained. Moreover, while the taxpayer testified that it made sales of aircraft on behalf of clients in connection with its aircraft brokerage business and as an accommodation (Tr. pp. 17, 24), the frequency of such sales was not established by introducing books and records of SAS. Nor did the taxpayer introduce Southern Aircraft's Florida sales tax returns, which might have shown what aircraft sales transactions were made. While the taxpayer argued that SAS only sold aircraft that it no longer needed for its leasing business, the record contains no sales or other documentary evidence to substantiate this claim. In sum, the Taxpayer has relied almost exclusively on the oral testimony of Mr. Smith to rebut the Department's *prima facie* case.

As noted above, a corrected return prepared by the Department is *prima facie* correct. 35 **ILCS** 120/5. At the hearing, the Department, without more, established its *prima facie* case by introducing this corrected return into evidence. Masini v. Department

of Revenue, *supra*. The burden thus shifted to the taxpayer to overcome the Department's *prima facie* case. A.R. Barnes and Co. v. Department of Revenue, *supra*; Masini v. Department of Revenue, *supra*; Copilevitz v. Department of Revenue, *supra*; Estate of Young v. Department of Revenue, *supra*. With the exception of the SAS income tax returns noted above, the only evidence provided by the taxpayer was the testimony of Smith. This testimony, consisting of conclusory assertions about Southern Aircraft's business, was in no way supported by any of Southern Aircraft's books and records other than the tax returns noted above. Such oral testimony, without corroborating books and records, is insufficient to overcome the Department's *prima facie* case. Mel Park Drugs v. Department of Revenue, *supra*. Consequently, Mr. Smith's largely unsubstantiated testimony was not sufficient to meet the taxpayer's burden. *Id*. Accordingly, I find that the taxpayer failed to overcome the Department's *prima facie* case that the purchase of the Gulfstream was subject to the Illinois use tax.

For the reasons indicated herein, I have determined that the taxpayer purchased the Gulfstream from SAS, that SAS was a retailer and that the taxpayer did not qualify for the occasional sale exemption. The taxpayer in its brief (at page 8), contends that this finding requires that the taxpayer receive a credit for the Westwind traded in for the Gulfstream pursuant to 35 **ILCS** 105/2 as construed by Department regulations authorizing such a credit. It contends that this outcome is dictated by evidence that the taxpayer traded in the Westwind for the Gulfstream. The Department does not contest this contention and concedes that the taxpayer is entitled to this credit. Dept. Brief p. 14. Accordingly, I find that the taxpayer's assessment should be reduced to allow it credit for the Westwind traded in for the Gulfstream pursuant to 35 **ILCS** 105/2.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's determination be finalized, as amended to reflect the trade in credit for the Westwind discussed above.

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Ted Sherrod
Administrative Law Judge

Date: February 20, 2001